BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

DOCKET NO. 2019-262-E

In re:

Application of Duke Energy Progress, LLC for Approval of Rider DSM/EE-11, Decreasing Residential Rates and Increasing Non-Residential Rates	)	DUKE ENERGY PROGRESS, LLC'S FURTHER REPLY TO COMMENTS

Duke Energy Progress, LLC ("DEP" or the "Company") provides the following response to the reply filed by the Office of Regulatory Staff ("ORS") on November 21, 2019, and to the revised comments filed by the South Carolina State Conference of the NAACP ("NAACP"), Southern Alliance for Clean Energy ("SACE"), and South Carolina Coastal Conservation League ("CCL") (collectively, "NAACP/SACE/CCL") on November 15, 2019 related to the Company's annual application to recover certain costs and revenue associated with its demand-side management ("DSM") and energy efficiency ("EE") programs.

I. RESPONSE TO ORS

1. On November 15, 2019, the Company filed a response to the review report filed by ORS filed in this proceeding. In that response, the Company explained that (1) there is no testimony or other evidence in this proceeding to support a deviation from the Commission-approved compensation structure used in this case; (2) ORS is collaterally estopped from relitigating Duke Energy's incentive compensation structure, which was fully litigated and decided in its most recent rate cases; (3) the Dominion RSA proceeding, was based on a settlement agreement that does not apply to DEP, is wholly inapplicable to the instant proceeding; (4) the

Commission's findings and approval of the Company's compensation structure in the recent rate cases is dispositive as to this issue in this proceeding; and (5) Duke Energy's compensation structure is reasonable and necessary to attract and retain high quality employees with the skills necessary to provide safe, efficient and reliable service to customers. In response to these positions, ORS argues that collateral estoppel does not apply in this instance, and offers that the Commission may revisit its policy decisions at any time. The Company challenges ORS assertions as discussed below.

2. ORS argues that collateral estoppel does not apply in this case based upon its review of caselaw from other jurisdictions, explaining that it could find no South Carolina caselaw on this issue.[1] The Company, however, provided the applicable South Carolina caselaw in its previous response:

> In the abstract, there is no legitimate reason to permit a defendant who has already thoroughly and vigorously litigated an issue and lost the opportunity to relitigate the identical question. . . . The public interest demands an end to the litigation of the same issue. Principles of finality, certainty, and the proper administration of justice suggest that a decision once rendered should stand unless some compelling countervailing consideration necessitates relitigation.[2]

As previously discussed, there is no question that the issue of Duke Energy's compensation structure was "actually litigated and determined by a valid and final judgment" in the rate cases, and that the determination as to the compensation structure was "essential to the judgment" in the Duke Energy rate case orders. Further—because its position is based upon a 2005 settlement agreement applicable only to Dominion—ORS has proffered no "compelling countervailing consideration necessitate[ing] relitigation" in this proceeding. While ORS urges the Commission

[1] ORS Reply at 1 n.1.

[2] *Shelton v. Oscar Mayer Foods Corp.*, 325 S.C. 248, 254, 481 S.E.2d 706, 709 (1997).

to disallow costs already approved by the Commission without even an evidentiary record, the Company asserts that the doctrine of collateral estoppel, as applied by the courts in this State, acts to prevent ORS's proposed relitigation of DEP's compensation structure in this proceeding.

3. ORS also argues that the Commission's findings as to the Company's compensation structure in the rate case do not apply in this proceeding because the rate case determined base rates while this EE/DSM proceeding adjusts the Company's EE/DSM rider. This is a flawed analysis—the costs are of exactly the same and merely allocated between employees who work on EE/DSM matters and those whose costs are included in base rates. Accordingly, the doctrine of collateral estoppel provides that "when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, *whether on the same or a different claim*."[3] This EE/DSM proceeding, while arguably a "different claim," involves issues of fact and law that were previously and conclusively litigated in the DEP rate case, including the appropriate compensation structure for the Company's employees, the same employees who administer the EE/DSM programs. Certainly if the tables were turned and the Commission had agreed with ORS in the rate case that its proposed adjustments were appropriate as applied to the Company's compensation structure, DEP would not then try to include such costs in proceedings that follow, particularly not in cases where there is no evidentiary record to support them. In light of the fulsome evidentiary record in the DEP rate case, the Commission's reasoned analysis in the rate case order as to the Company's compensation structure,[4] and the lack of an evidentiary record

[3] *Carman v. S.C. Alcoholic Beverage Control Comm'n*, 317 S.C. 1, 6 (1994) (internal citations omitted) (emphasis added) (holding that an agency's previous conclusions as to an applicant's moral character was binding in subsequent proceedings).

[4] Order No. 2019-341 at 85-87, Docket No. 2018-318-E (May 21, 2019).

in this proceeding upon which even to base a disallowance (which would still not apply due to the issue of estoppel), the Commission's previous determination is dispositive as to this issue in this proceeding.

II. RESPONSE TO NAACP/SACE/CCL

4. In its comments, NAACP/SACE/CCL state that, despite maintaining a cost-effective portfolio of EE/DSM programs, DEP has fallen short of the 1% target agreed to in the 2011 merger settlement with SACE and CCL. DEP has worked consistently to achieve the aspirational goal of savings equal to 1% of the previous year's retail sales since the goal was established, though circumstances largely outside the Company's control have made meeting that target more difficult. One of the largest obstacles to achieving the 1% is the inclusion of opted out customers in the baseline of the calculation. Customers who have opted out of the rider are ineligible to participate in the Company's program offerings. When these customers are excluded from the baseline, DEP actually exceeded the 1% target in 2018, achieving savings equal to 1.19% of 2017 eligible retail sales. In fact, SACE reported in its 2018 Energy Efficiency in the Southeast report that, of the 11 utilities studied, DEP has one of the highest savings in the region, second only to Duke Energy Carolinas.[5] Nevertheless, the Company is in the process of replacing its 2016 market potential study with a new one in 2020. This new study will inform the Company and stakeholders of the savings potential going forward.

5. NAACP/SACE/CCL are also concerned that DEP has projected a decline in efficiency savings in 2020. The Company has discussed this projected decline with the Collaborative and explained that the reductions are in anticipation of market changes associated

[5] Southern Alliance for Clean Energy, *Energy Efficiency in the Southeast: 2018 Annual Report* at 4 (2018), *available at* https://cleanenergy.org/wp-content/uploads/2018-Energy-Efficiency-in-the-Southeast-SACE-2.pdf.

with new lighting standards effective January 1, 2020. The commitment to pursue an aspirational goal of achieving 1% of savings expired in 2019, and the Company does not believe that using an aspirational target in the context of setting rates is appropriate as it may result in higher customer rates. The Company remains committed to meeting and exceeding the projections if possible, but chooses to be conservative when making projections that affect rates. Nevertheless, the Company will continue to inform the Collaborative of its performance and work with stakeholders to identify ways to grow savings.

6. While NAACP/SACE/CCL argue that the Company should increase its investments in lower-income customers and communities, the Company is always looking for opportunities to expand the reach of its income-qualified programs and to remove barriers to participation. Further, the income-qualified program is only one means of reaching low-income customers, who also enjoy the direct benefits of other programs that offer free energy efficiency measures and in-home installation at a rate higher than the proportion of low-income customers in the service territory. According to the Company's internal review, which was shared with CCL, SACE, and other Collaborative members, more than 40% of the households participating in programs that are free to customers made less than 200% of the federal poverty level, the threshold for participation in DEP's low-income programs. Additionally, the behavioral programs the Company offers provide substantive tips and suggestions for changing behaviors which can greatly benefit the low-income community while also promoting participation in the programs referenced above.

7. The Companies believe that the establishment of an annual reporting protocol as suggested by NAACP/SACE/CCL would be unnecessarily burdensome. The Company's filings are designed to present the information necessary for cost recovery and rate setting. Adding more

information that is not relevant to cost recovery and rate setting will only serve to make the annual filing more cumbersome and complicated. As NAACP/SACE/CCL point out, any information that may be relevant to the rider application may be obtained through discovery and used by that party for their own comments in the proceeding. Moreover, the Company has already committed to developing a reporting mechanism that presents the top-level data the intervenors are requesting within the Collaborative.

8. While NAACP/SACE/CCL argue that the Company places too great an emphasis on behavioral programs, the Company believes that such programs are a cost-effective way to reach all customers, including the low-income customers discussed above, with little or no upfront capital requirements and serve to promote other efficiency programs. While the Company offers a wide variety of programs that deliver longer-lived savings, most of these have substantial out-of-pocket costs, which are a barrier to some customers' participation. The Company continues to attempt to address these barriers while maintaining the cost effectiveness of the portfolio. The Company agrees with NAACP/SACE/CCL that the Commission should adopt the Utility Cost Test ("UCT") as the primary test for cost effectiveness, as it more accurately reflects the full costs and benefits of energy efficiency programs than the Total Resource Cost ("TRC") test as it is presently calculated.

9. While NAACP/SACE/CCL suggest that the Commission take a more active role in directing the efforts of the Collaborative, the Company believes that the independence of the Collaborative is part of what makes it effective. The Collaborative consists of a variety of stakeholders with varying perspectives; the most recent meeting was attended by 38 representatives from 17 different local and national organizations, in addition to the Company. The Collaborative enables its members to establish priorities and objectives for its meetings every

other month, and, as NAACP/SACE/CCL point out, DEP and the Collaborative stakeholders have worked to implement a number of positive changes to the Collaborative process. The Company challenges NAACP/SACE/CCL's suggestion that the Company has made proposals at the Collaborative with insufficient notice to its members. The meeting date is determined 6-8 weeks in advance, the agenda is circulated for suggestions and recommendations 3 weeks in advance, and all materials available for review are distributed at least one week prior to the meeting. The members of the Collaborative set the priorities for 2019 at the first meeting of the year and have focused on those priorities through 5 additional meetings and numerous conference calls. Additionally, contrary to NAACP/SACE/CCL's recommendation, the Collaborative discussed in January 2019 whether a third-party facilitator was needed and determined that one was not necessary. Given the improvements and engagement this past year, the Company agrees with the Collaborative's conclusion that there is no need for a third-party facilitator for their meetings, which would result in an unnecessary incremental cost without a commensurate benefit.

10. As for NAACP/SACE/CCL's suggestion that the Commission "seek comment from Collaborative participants" as to the Collaborative process, stakeholders of that process are always permitted to intervene in the annual DEP EE/DSM rider proceeding and provide any feedback that may be appropriate, such as NAACP/SACE/CCL have done here. This year, the Collaborative has identified ways to tap into overlooked demographics, improve reporting protocols, and address issues across jurisdictions. The Company is proud of the work the Collaborative is doing and intends to continue engaging with stakeholders in this forum. However, to ensure that the improvements the Company has made are accomplishing the intended results, the Company will solicit feedback at its next meeting from all members of the Collaborative on the critiques and suggestions identified in the intervenors' comments.

CONCLUSION

The Company appreciates this opportunity to provide a response to the revised comments of NAACP/SACE/CCL and to the response of ORS. The Company requests that the Commission approve the Company's proposed Rider 11 to be effective January 1, 2020; reject ORS's Incentive Adjustment; and grant such other relief as the Commission deems just and proper.

Respectfully submitted this 26th day of November, 2019.

s/Samuel J. Wellborn
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